



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MALINDI**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**  
**PETITION NO. 49 OF 2019**

**ABDALLA KIRAO WANJE.....PETITIONER**

**VERSUS**

**DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT**

**Coram: Hon. Justice R. Nyakundi**

**The Petitioner**

**Ms. Sombo for the state**

**RE-SENTENCING**

In the instant petition, the Petitioner seeks resentencing following the Supreme Court of Kenya's decision in **Francis Karioko Muruatetu & Another vs Republic, Petition No. 15 & 16 of (2017) eKLR** declared the mandatory nature of the death sentence and the commutation of that sentence by an administration fiat to life imprisonment unconstitutional and therefore null and void.

The rationale is that the mandatory nature of death sentence as provided for under section 204 of the penal code deprived trial courts judicial discretion to consider aggravating and mitigating circumstances to enable the court to impose an appropriate sentence based on the peculiar circumstances of each case. Thus, a mandatory sentence fails to conform to the tenets of fair trial that accrue to the accused person under Article 25 of the Constitution.

The principle in **Muruatetu** only applies in matters with which the court did not have discretion to take into account the mitigation of the Petitioner. These are cases which the judicial officer only needed to pluck out the sentence from the section it is prescribed and impose it on the offender without considering the individual circumstances of the case. Cases which minimum mandatory sentences were not prescribed or were it is prescribed by the judge nevertheless imposed any other sentence other than the one prescribed, may not be entertained under the principle in **Muruatetu**.

A brief background of the matter is that the Petitioner was arrested and charged with the offence of attempted murder and malicious damage to property. He was tried, found guilty as charged and sentenced to 15 years imprisonment and 2 years imprisonment respectively, which were to run concurrently. The Petitioner also appealed against the conviction and sentence but the same was dismissed by both appellate courts for the lack of merit.

In mitigation, I'm alive to the fact that the Petitioner is a first offender with no previous criminal records and that he is the sole breadwinner for his family. He has a wife and six (6) children who depend of him for their day to day survival. He claims that he has fully reformed. That he has undergone courses both commercial and spiritual which will benefit the society if he is given a chance to re-join the society. He has prayed that the court takes into account the pre-trial custody and the period he has already spend as part of his sentence.

In aggravation, I have noted that the attack was planned and specifically intended. The weapon used namely spear which was used to stab PW1 on the nose. The attack was not done in self-defense. The conduct of the Petitioner and his colleagues was intended to kill. The conduct before during and after setting PW1 on fire is indicative of a positive intent to cause his death.

I have noted that the Court of Appeal determined the issue as regards the legality of the sentence. In terms of section 220 of the Penal Code, attempted murder is a felony and the sentence prescribed is a maximum of life imprisonment. The Petitioner was sentenced to 15 years imprisonment which is not maximum term of imprisonment. Thus the trial court exercised its discretion in passing the sentence.

In the premises, the sentence imposed herein is not a minimum mandatory sentence, hence it does not fall under the principle in **Muruatetu**. The gravity and the manner in which the offence was executed in my view warrants the sentence imposed by the trial court. The upshot is that the Petitioner's petition filed on the 23<sup>rd</sup> of September 2019 is hereby dismissed for want of merit.

It is so ordered.

**DATED, DELIVERED AND SIGNED AT MALINDI THIS 14<sup>TH</sup> DAY OF APRIL 2020**

**R. NYAKUNDI**

**JUDGE**